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GENDER APPROACH TO MIGRATION

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ISTANBUL CONVENTION: TOWARDS THE GENDER APPROACH TO MIGRATION

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Abstract: This paper, based on the Istanbul Convention, seeks to explain the gender approach to migration in international law. Gender that has to do with women and girls, who try to get away from situations of violence. The Chapter VII of the Istanbul Convention on preventing, combating violence against women and domestic violence, is an important key to the history of immigration not only to the European but also to a global context. In the European context, the jurisprudence of the European Court of Human Rights has been helpful in the field of female mutilation, where it was based on a protection par ricochet that is first of all sensitive to the gender of women who are victims of violence in their own country of origin.

Keywords: Istanbul Convention; protection of human rights; protection of women; female genital mutilation; gender in migration; international law; ECtHR; domestic violence; violence against women; migration status.

INTRODUCTION

Our paper is based on two central questions: Why talk about a gender approach to migration? What are the issues related to this approach? These are some of the topics that are based on a basic axis that creates topics for legal discussions and develops new issues in the global international community.

The migration phenomenon and especially of women is recognized from the history of immigration. According to the percentages of the International Organization of the Immigration (IOM) women are not treated and/or considered according to their gender, gender identity and/or sexual orientation like every individual¹. The main

¹IOM, Total International Migrant Stock By Region and Sex, Mid-Year 2020,

question is why talk for a gender approach to migration? There is no precise framework that takes into consideration all the elements, trends, percentages at an international level and especially for women who immigrate from Asia and Africa. The male member of the family and his migration could only be family-related given that women and girls also migrate independently, voluntarily for economic reasons and driven by conflicts, famines, climate change² and all types of violence (Marchetti, 2018; Fresnoza-Flot, 2022). The Special Rapporteur on the human rights of migrants stated that:

“(…) migration is a gendered phenomenon (...) gender-specific norms governing society are decisive factors, as are gendered expectations and differentiated power relations³ (...)”.

2021: www.migrationdataportal.org/-themes/gender-and-migration

²Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, Violence against Women and Girls in the Context of the climate crisis, including environmental degradation and related disaster risk mitigation and response, A/77/136 dell'11.07.2022.

³Special Rapporteur on the human rights of migrants, The Impact of Migration on Migrant Women and Girls: A Gender Perspective, A/HRC/41/38 of 15.04.2019, par. 31.

It is not a gender phenomenon only for the reasons of migration, but also for the violence which, despite being a constant along the migrant routes, disproportionately affects women and girls both during migration and in the place of destination. Women are at higher risk of acts of violence, including gender-based violence, exploitation, trafficking, slavery and detention, by various state and non-state actors, including criminal gangs – both in transit and at destination⁴.

The notion of gender dimension has been ignored both by the IOM itself and by international hard law. We only have the Council's of Europe Istanbul Convention on preventing and combating violence against women and domestic violence of 2011, which entered into force in 2014 (here in after: "Istanbul Convention")⁵ as a first step in recognizing women's rights and domestic violence. Chapter VII of the Convention of Istanbul has already focused on a specific

⁴Special Rapporteur on the human rights of migrants, The Impact of Migration on Migrant Women and Girls: A Gender Perspective, A/HRC/41/38 of 15.04.2019, par. 31.

⁵Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 7 April 2011, entry into force 1 August 2014) CETS 210 (Istanbul Convention), Art 3(b).

aspect of forced migration in relation to the resulting gender violence against women and domestic violence. The obstacles to recognizing the gender dimension and the credibility of the applicant for international protection leads the courts to change paradigm, moving from the burden to the victim to demonstrate the violence suffered and the impossibility of relocation to another part of the state of origin, thus obtaining the status of refugee, and demonstrating that the state of origin respects the obligations of due diligence required at the international level by foreseeing and effectively repressing gender violence against women. This is a *par ricochet* protection relating to the genre of a sensitive and not perfectly clarified nature (Macklin, 1995; Crawley, 1999; Crawley, 2001; Mullally, 2011; Firthh, Mauthe, 2013; Oosterveld, 2014; Freedman, 2015; Spikkerboer, 2016; Rikhof, J., Geerts, 2019). This interpretation has been linked to climate change or slow-onset emergencies. There is also a particular case of gender violence against women during the migratory routes or in the place of destination, such as particular cases that cannot be part of our investigation.

THE MISSING GAPS OF GENDER IN INTERNATIONAL MIGRATION LAW

The United Nations Convention of 1951 relating to the status of refugees defined the refugee:

“(...) having good reason to fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, outside the country of which he is a citizen, and cannot or does not want, due to this fear, to avail himself of the protection of this country; or who, not having citizenship and being outside the country in which he had his habitual residence in following such events, cannot or does not want to return due to the above fear (...)” (Farahat, 2022).

This is a broad definition with a margin of interpretation that is not precise and certainly neutral, if not indifferent to the definition of the gender (Farahat, 2022). The Convention was incapable of providing answers relating to the status of a refugee woman and as a consequence gender violence was understood as a form of persecution. The absence of the gender dimension not only depends on a socio-political approach where the negotiations were conducted but also on a clear public-private contrast where

the state had no international legal obligations with regard to the private dimension of violence (Romany,1994; Sullivan, 1995). The recognition of gender discrimination emerged only during the 1979 adoption of CEDAW and the general recommendation n.19 of the Committee established for the Elimination of Discrimination Against Women (CEDAW) where violence against women was a legal instrument of the UN. Women were absent from the international context and connected only with the private dimension in a sphere where women's activities could not obtain the character of policies which was conceived in the male experience, i.e. an object of protection also on an international basis.

The definition of refugee includes the category of a social group where women who are victims of gender violence in their country of origin can be included. Gender was not included in Art. 3 of the Convention of 1951 despite attempts during the negotiations to include sex as a reason for persecution. According to Meyersfeld:

“(...) the category of belonging to a group having certain characteristics presents a series of difficulties, until “women” can be considered a particular social group (...).

Belonging to a particular social group does not seem to grasp the specificity of the multiple female situations, without excluding the political condition of a woman requesting international protection (...)” (Meyersfeld, 2010).

Equally important, Freedman stated that:

“(...) women asylum seekers are still constructed in specific gendered ways which may mean that their claims will not be considered as “serious” (Freedman, 2015) (...)”.

It is possible to think of the situation of Iranian women, where they are considered objects of “state” violence and whose civil rights are constantly trampled on, simply because of “being women”⁶. It must be recognized that for years the reasons for forced migration from that country have been linked to gender, increasing restrictions imposed by the regime, the status of mothers, women or daughters of men identified by the regime, for example - and to ethnicity - belonging to a minority. It is possible to refer to

⁶UN Women statement on women’s rights in Iran, 27 September 2022, <https://www.unwomen.org/-en/news-stories/statement/2022/-09/un-women-statement-on-womens-rights-in-iran>; Iran: UN condemns violent crackdown against hijab protests, 27 September 2022, <https://news.un.org/-en/story/2022/09/1128111>

a “particular social group” as a category of persecution. This category is reductive and does not capture the political side of the situation of women who challenge consolidated gender roles in society and imposed by the state (Pickering, Barry, 2013; Spijkerboer, 2016; Timmermann and others, 2018).

Within this context, we also recognize soft law acts that have recovered the gender dimension that was lost in the field of international negotiations through a series of guidelines addressed to states. Thus we take into consideration the UNHCR guidelines of 2002 (Gender Guidelines)⁷ which stated:

“(...) social subset defined by innate and immutable characteristics (...) and who are frequently treated differently than men⁸ (...). The mere belonging to a group

⁷UNHCR, Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01 7 May 2002 (Gender Guidelines). UNHCR 1991 (UN High Commissioner for Refugees (UNHCR), Guidelines on the Protection of Refugee Women, July 1991, <https://www.refworld.org/docid/3aefb3310.-html>. Specific Gender Lines: <https://www.unhcr.org/publications/operations/3b9cc21c4/sexual-violence-against-refugees-guidelines-prevention-response-unhcr.html>

⁸Gender Guidelines, op. cit., par. 30.

does not in itself constitute a valid argument for obtaining refugee status, as the applicant must demonstrate that she is specifically at risk due to this membership (...)”⁹.

We talk about gender violence in a problematic way when we refer to violence against women:

“(...) the justified fear of being persecuted depends on the particular circumstances of each individual case (...)”
(Timmermann and others, 2018).

The elements for the recognition of refugee status include the membership of a woman or girl to a particular group where women are at risk of female genital mutilation and that the applicant is at risk due to this membership. The Gender Guidelines take into consideration violence that amounts to persecution, i.e. sexual violence, female genital mutilation, domestic violence, human trafficking as well as acts that inflict severe mental and physical pain and suffering. The soft law tool identifies the violence of laws that can be persecutory and that enact traditional or cultural norms. Already the CEDAW Committee through the general Recommendation No. 32 of 2014 strengthened the

⁹UNHCR, Views on Gender Based Asylum Claims and Defining “Particular Social Group” to encompass Gender, 2016, <https://www.unhcr.org/en-us/582221fc4.pdf>

gender guidelines by underlining how violence against women and by any form of persecution on the basis of gender is: “(...) one of the major forms of persecution experienced by women in the context of refugee status and asylum (...)”¹⁰.

The general Recommendation deals with: honor crimes, trafficking, acid attacks, rape, any other form of sexual violence, domestic violence as well as the imposition of the death penalty and physical punishments which remain in highly discriminatory judicial systems such as forced sterilization, political and religious persecution. The CEDAW Committee noted the seriousness of these types of forms of domestic violence which may constitute persecution, also stating that:

“(...) if one is able to establish that a woman has been persecuted because she is a woman, or for reasons of gender, then it seems less relevant whether she belongs to a broad or narrow group of women (...)” (Edwards, 2012).

The specificity of belonging to a group is not an easy operation but it considers the violence that arises from

¹⁰CEDAW, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, CEDAW/C/GC/32, 14 November 2014, par. 15.

natural disasters or slow-onset events (Zickgraf, 2021) as a form of violence to every type of physical, economic or sexual violence including crisis not only economic but climatic as a context that presents itself¹¹.

ISTANBUL CONVENTION: CHAPTER VII

As we warned, Chapter VII of Istanbul Convention deals with women's migration and asylum (Mcquigg, 2019; Kanbur, 2021). It is important to analyze articles 60 and 61. In particular art. 60 reports: 1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women can be recognized as a form of persecution under Article 1, A (2) of the 1951 Refugee Convention and as a form of serious harm giving rise to complementary/subsidiary protection. The parties shall ensure that a gender-sensitive interpretation is applied to each of the grounds of the Convention, and that in cases where it is established that the fear of persecution

¹¹Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, Violence against women and girls in the context of the climate crisis, op. cit., par. 7.

is based on one or more of those grounds, asylum seekers are granted the status of refugee, depending on the applicable relevant instruments. Parties shall take necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum seekers, as well as gender-based guidelines and gender-sensitive asylum procedures, including the granting refugee status and request for international protection. Continuing with art. 61: 1. The parties shall take legislative or other measures necessary to respect the principle of non-refoulement, in accordance with existing obligations under international law; 2. The parties shall take the necessary legislative or other measures to ensure that victims of violence against women in need of protection, regardless of their status or place of residence, may under no circumstances be expelled to a country where their lives may be in danger or where they may be exposed to the risk of torture or inhuman or degrading treatment or punishment (De Vido, Frulli, 2023).

We note between these two articles the choices of the profiles of the provisions in question, specifying that the right to asylum ignores the differences in the way in which

women and men live in a state of persecution. The lack of gender leads to a lack of recognition of gender-based violence against women and as a reason for obtaining refugee status¹². This highlights the relationship between forms of gender violence against women committed by states and also by non-state actors. When it comes to some forms of violence, the explanatory report notes that forms of violence of this kind are automatically considered to cause serious harm and are capable of offering protection under international migration law. The determination of the circumstances that include this framework of refugee status is indicative of the explanatory relationship that triggers controversies relating to art. 60 and slowing down the ratification processes even by non-European states (Halperin-Kaddari, 2023).

The positive element is the tracing of a particular social group of women who are victims of gender violence including ethnicity and nationality in relation to sexual violence and control of reproduction as a tool of ethnic cleansing as well as religion that does not conform to religious norms or customs based on honor. Within this

¹²Explanatory Report to the Istanbul Convention, 11 May 2011, par. 310.

context we note the belonging to a social group, the political opinion especially of women who are persecuted for not conforming to roles imposed by societies or for expressing themselves against traditional gender roles. The use of the category of belonging to a social group is a fundamental element and proceeds to a sort of stigmatization of women victims of violence, preventing the light of the political, social and religious dimensions of forms of violence.

The third paragraph of art. 60 takes into consideration the measures to be adopted for a gender approach to migration which can be traced back to various distinct categories. This includes gender-sensitive migrant reception procedures that take into account differences between men and women as well as their experiences and protection needs. Protection that includes separate accommodation and toilets for men and women, female staff, ad hoc codes of conduct in the case of private provision of services, counseling and psychological support services. The second category refers to operators given that they received guidelines to raise awareness of the specific protection needs of women seeking asylum and who are victims at risk

of gender-based violence. The guidelines are culturally sensitive, such as trauma sensitive and gender sensitive. Sensitivity that means at the same time not greater protection as an oxymoron from a legal point of view. On the other hand, we have interviews with the authorities of the male members of the family of women who find themselves in a family context of violence. Possibility for women to raise protection needs leading to separate paths to obtaining international protection. Interviews based on gender with interpreter and respect for confidentiality, that protection of sensitive data and personal data is still a difficult topic for European companies, therefore even worse for companies such as in Asia and Africa.

Of course, even during the preparatory work, there were some states that wanted to modify and include gender protection. In particular, Belgium argued: “(...) sauf grande gravité, un seul cas ne peut suffire pour obtenir la protection (...)” (Staiano, 2023). Italy proposed an amendment to specify the meaning of persecution on the basis of gender by choosing forms of violence as a reason for persecution, namely: violence against women during armed conflicts, systematic rape against the population and

ethnic minorities, crimes of honor and mutilations female genitalia, as topics that have been under discussion and without drastic solutions for many years. Poland also asked to formulate an ad hoc rule that allows the individual state to proceed with a case-by-case analysis, avoiding other abuses and excessive openness in the interpretation of art. 60. Equally important are the attempts to reduce the scope of the state-centric provision which state: “(...) concern with the preservation of the borders and security of states is dominant (Chinkin, Charlesworth, 2022) (...)”. Images of orderly national domestic spaces separated by state boundaries from outside dangerous chaos and anarchy reflect the male sex of the state. Not having more women in government roles, is an important but not definitive element in the incorporation of an approach of gender in power dynamics, as well as to propose new conceptions of power - relevant in the context of migration - which deemphasizes the meaning of borders and state sovereignty as essential components of the concept of the state and to the formation and preservation of relations between states and other international actors, including civil society (Chinkin, Charlesworth, 2022).

It is understood that a state-centric position cannot be justified and distances itself from the migratory threat which includes women fleeing gender violence in their country of origin and the refusal to accept too stringent obligations in terms of international law (Halperin-Kaddari, 2023).

ISTANBUL CONVENTION AND RELATIONS WITH GREVIO

GREVIO was a monitoring group of the Istanbul Convention organized by 15 experts elected by the Committee of the parties from among the candidates nominated by the latter for a term of four years (Wojciech, 2022). Art. 60 was a legal instrument explicitly adopted for the implementation of the Convention¹³. Some legislations such as Finland, Malta, Spain, Sweden and Serbia have not taken gender violence into consideration as a form of persecution. Other countries such as Italy, Montenegro,

¹³GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, 2021: <https://www.coe.int/en/web/-istanbul-convention/-/mid-term-horizontal-review-provides-a-panoramic-view-of-the-implementation-of-the-istanbul-convention>

Portugal, Turkey have not adopted legislation referring to persecution on the basis of gender and have taken into account the requests for protection of belonging to a social group where gender identity and sex are included within the orientation of physical, psychological or sexual violence related to persecution¹⁴. Belgium achieved par. 2 of art. 60 of the Istanbul Convention by establishing a specialized unit that was related to gender within an asylum agency¹⁵, and like Finland for the identification of persecution risk factors which promoted the training of professional figures on these issues¹⁶. Sweden has included internal procedures in reception centers identifying situations of vulnerability where the right of women assisted to an interpreter are listened to by an official as we have also seen in the case of Austria, Belgium, Denmark, Montenegro, Holland and Sweden which have also continued with training on gender

¹⁴GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 536.

¹⁵GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 541.

¹⁶GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 540.

issues with qualified personnel as we have noticed in Italy¹⁷. The weak points in the assistance procedures are for example centers that did not distinguish between rooms and toilets for men and women, the absence of confidentiality during interviews, poor training of staff in reception centers due to the different realities that manage them and so on¹⁸.

As far as art. 61, GREVIO took into consideration restrictions that prevent access to state borders, thus determining a type of indirect refoulement given that there is a lack of practices that allow the adequate identification of victims of violence against women who require protection against refoulement¹⁹:

“(…) nevertheless observes that, in practice, if a marriage or a relationship is dissolved, a foreign woman may run the risk of being unable to renew her residence permit if she finds herself without the means to prove sufficient

¹⁷GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., parr. 548-552.

¹⁸GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 554.

¹⁹GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 571.

financial resources. GREVIO is concerned about the consequences that this may have for women who are victims of violence in terms of a higher risk of exposure to violence, an obstacle to pressing charges and the problems that they may face in regaining control of their lives, particularly after divorce proceedings (...)”²⁰.

The lack of deterrent policies based on abandonment at sea and the closure of ships lead some of the migrants to safety. These are policies where the violation of human and migrant rights have certain effects on women fleeing domestic and sexual violence (Lagerwall, Aviat, 2023).

THE LACK OF A PROPOSED DIRECTIVE BY THE EUROPEAN UNION

It is noted that the Directive of the European Parliament and of the Council on combating violence against women and domestic violence presented on 8 March 2022 did not include procedures relating to the request for refugee status or international protection (De Vido, 2022; De Vido,

²⁰GREVIO, Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports, op. cit., par. 164.

2022)²¹. We have only seen some general references on migrations which are found in the preamble as undocumented migrants who are identified as victims with specific needs²². Articles 16.5 and 35 of the text refer to a category of irregular female migrants as victims of violence who have need specific support. The lack of a legal basis for the proposal is not surprising for migrant women, as was noted by the Commission itself in the explanatory memorandum based on Articles 83, par. 1 and 82, par. 2 TFEU (Blanke, Mangiamelli, 2021). The lack of an aspect of migration that was contemplated in one of the signing decisions by the Council of the Convention of Istanbul of 2017, n. 866, remains important²³. The decision had a legal

²¹Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final of 8 March 2022.

²²Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 final, op. cit., recital n. 56.

²³Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence as regards asylum and non-refoulement, in OJ L 131 of 20.5.2017, p. 13.

basis based on Art. 78, par. 2 TFEU where in connection with Art. 218, par. 5 TFEU (Blanke, Mangiamelli, 2021) concerns measures relating to a common European asylum system. The legal basis includes and allows the European Union to implement Chapter VII of the Istanbul Convention relating to international protection procedures and at European level.

THE REQUEST FOR INTERNATIONAL PROTECTION. CREDIBILITY AND ONGOING PROBLEMS

Proving persecution of a woman who has suffered domestic violence is not an easy argument to prove both nationally and internationally. The lack of information, the need to report the violence suffered and to prove that you are a victim are topics that include many risks.

On the one hand, belittling the requests of women victims of violence means the failure to demonstrate their conditions, above all because from a psychological point of view the continuous fear they experience simplifies the position of women in certain societies as rigid parameters

for a particular social group.

According to Mullally:

“(...) the procedures for the recognition of refugee status per se lack, in the terms of the 1951 Convention, a gender perspective, because the rigid categorization leads to identifying “women” of a specific society, other than the European one, always as victims in need of protection, without identifying the reasons for persecution in a more precise way, paying attention to profiles of intersectional discrimination (...)” (Mullally, 2011).

For women, female genital mutilation is comprised in an organization where participate groups of women of a given society who live under certain conditions, as well as according to elements of intersectional discrimination that emerge pursuant to the CEDAW Committee despite the fact that these elements are sensitive and concern the guidelines for the states parties as well as the elaboration of concluding observations. They can be seen:

“(...) as inadmissible numerous individual communications concerning alleged violations of fundamental human rights as a consequence of the denial of refugee status against states that have ratified the Optional Protocol to CEDAW, showing considerable

deference towards the choices of the state in question, including when the latter's authorities questioned the credibility of the woman (...)” (Briddick, 2002).

Within this context we recall the *M.ff.N. v. Denmark*²⁴ where a woman (a Burundian national) who requested asylum in Denmark, claimed to have fled for reasons of political persecution and to have been raped by three men before leaving her country. But this woman was raped and again forms of physical violence are deported. The CEDAW Committee considered the case as inadmissible due to the failure to exhaust internal remedies based on Art. 4, par. 1 of the optional protocol. Rape was not the subject of the request for international protection where the woman invoked the fear of being arrested and killed by the Burundian authorities as a member of the national liberation forces²⁵. As for the interrogations, the woman could not answer questions about the identity of the alleged perpetrators. The state did not have the opportunity to consider the gender-based arguments in support of the applicant's claim which were the focus of the

²⁴*M.ff.N. v. Denmark*, CEDAW/C/55/D/35/2011, 26 luglio 2013.

²⁵*M.ff.N.*, op. cit., par. 8.3.

communication to the Committee. Thus the problem of the woman's credibility arose given that the immigration service had doubts regarding the way in which the state had broken down the reason for the request for protection based on the political opinion of discrimination on the basis of gender. The analysis of the minority of experts of the CEDAW Committee shed light on the appeal. According to some members of the Committee such as Šimonović, Halperin-Kaddari, Neubauer and Pimentel the woman fled Burundi due to political persecution and she was raped by three men while she was trying to escape. This fact should be sufficient for the state party to consider rape a form of discrimination against women and a gender-related persecution, whether this is an independent reason or intersects with political persecution²⁶. The woman should not have been asked to make express reference to rape as a form of discrimination against women, but only to “raise the substance of her claim, which is what she did”. In fact, the woman had tried: to having a well-founded fear of

²⁶Individual opinion (dissenting) by Committee member Ms. Dubravka Šimonović, joined by Ms. Ruth Halperin-Eaddari, Ms. Violeta Neubauer and Ms. Silvia Pimentel, par. 4 of the opinion.

suffering, a form of discrimination on the basis of gender if deported, while the state had not adequately considered the context in which the rape occurred, ignoring the connections with the rampant violence and impunity created by the conflict (Rainey, Wicks, Ovey, 2017; Villiger, 2023)²⁷.

We go on with the L.O and others v. Switzerland case of 2020 (Briddick, 2020). In this case the Committee of CEDAW held the appeal inadmissible because it considered that the state took steps:

“(...) to take sufficient account, in assessing the extent of domestic violence in Mongolia, the legal framework of reference and the availability of protection by the authorities, as well as the existence of a certain number of shelters for victims of domestic violence in the country of origin and underlining how the author of the communication had not explained why he had not filed a complaint against his ex-partner before the competent Mongolian authorities²⁸ (...) sovereign states are in

²⁷Individual opinion (dissenting) by Committee member Ms. Dubravka Šimonovi, joined by Ms. Ruth Halperin-Eaddari, Ms. Violeta Neubauer and Ms. Silvia Pimentel, par. 5 of the opinion.

²⁸ L.O. and others v. Switzerland, CEDAW/C/76/D/124/2018, decision of 6 July 2020, par. 6.7.

principle free to determine the nature, structure and procedures of their domestic systems for the determination of refugee status (...)” (Villiger, 2023)²⁹.

The traumas of the victims/survivors of violence and how they are disposed of by the Convention of Istanbul did not exclude the general orientation of the same convention as a hemenutical evolution also within the UN Committees, where the analysis is limited to the jurisprudence of the European Court of Human Rights (EctHR).

ECtHR AND FEMALE GENITAL MUTILATION

The recognition or not of refugee status for women victims of violence was one of the topics where the risk of female genital mutilation in the country of origin or for women victims of domestic violence is specified as a final orientation from the cases of the ECtHR. Thus, a lack of gender sensitivity was demonstrated (Sjöholm, 2018). Given that the prohibition of female genital mutilation can be manifested and based on Istanbul Convention and on art. 38

²⁹ L.O. and others v. Switzerland, CEDAW/C/76/D/124/2018, 6.7 and 6.8.

in particular (Mestre I Mestre, 2023).

Let us recall the *Collins and Akaziebie v. Sweden* case who was admitted in 2007³⁰, Emily Collins and Ashley Akaziebie as a mother and daughter of Nigerian nationality who hail from Delta state, have experienced grievances as they are expelled from Sweden who had international protection and who faced a real risk of being subject to female genital mutilation. The appeal was inadmissible given that the appellants did not demonstrate the existence of a real and concrete risk of being subjected to the practice. The ECtHR stated:

“(…) that Female Genital Mutilation consists of a form of torture, inhuman or degrading treatment, but, in the present case, considered that a) laws against mutilation had been adopted in Nigeria and so also in the applicants' state of origin; b) the pregnant applicant had not sought protection in other states of Nigeria but had decided to migrate to Europe; c) her behavior demonstrated a notable degree of autonomy so it was not clear why she could not have protected her daughter from the risk of female genital mutilation; d) the government legitimately had doubts about the credibility of the appellant who had

³⁰ECtHR, *Collins and Akaziebie v. Sweden* of 8 March 2007.

not communicated her condition during the first interview with the authorities (...)”³¹.

In the same context we have the *Izevbekhai v. Ireland* case of 17 May 2011³², where the appeal was rejected and was manifestly unfounded:

“(...) considering the judges that the family, which enjoyed a privileged position in Nigeria and was against mutilations, could have provided protection of the appellant itself (...)”³³.

Equally important was the *R.B.A.B. and others* case of 2016³⁴, where the ECtHR rejected the appellant's arguments stating that:

“(...) in some Somali provinces, including that of the appellant, laws had been adopted prohibiting female genital mutilation as a practice harmful and detrimental to health of girls and that, in the present case, there was no real risk for the girl or woman of being subjected to mutilation by people outside her family unit (...)”.

It is possible to say from the traces of the cases just cited a *de jure* recognition regarding the ban on female genital

³¹ECtHR, *Collins and Akaziebie v. Sweden*, op. cit.

³²ECtHR, *Izevbekhai and others v. Ireland* of 17 May 2011.

³³ECtHR, *Omeredo v. Austria* of 20 September 2011.

³⁴ECtHR, *R.B.A.B. and others v. the Netherlands* of 7 June 2016.

mutilation which unfortunately or not has forgotten the structures of society that force women to be subjected to this type of practice.

(FOLLOWS). THE CASE OF DOMESTIC VIOLENCE

Forms of gender violence against women have a cultural matrix in relation to domestic violence and are pervasive given that it is considered “a proper ground for claiming asylum” (Freedman, 2015). Domestic violence can constitute a fear that is founded and based on the reason of belonging to a particular social group³⁵ to an acceptance of a level of seriousness where psychological violence and also economic fear deserve in our society today to recognize the status of refugee. In this sense Mullally as the current Special Rapporteur on trafficking in persons, and especially of women and children, stated that:

“(...) domestic violence challenges not only the boundaries of refugee law's categories, but also the continuing gap

³⁵CEDAW, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, CEDAW/C/GC/32, 14 November 2014, par. 15.

between “private harms” and state accountability (...)”
(Mullally, 2011).

Within this context we recall from the ECtHR the *N. v. Sweden* case³⁶ which concerns the risk of the woman rejected towards Afghanistan subjected to various forms of violence including domestic violence, where the ECtHR stated that:

“(...) despite being aware of the serious violations of fundamental human rights in Afghanistan, these were not of nature such as to show, in themselves, that there was a potential violation of the Convention in the event that the applicant was returned to that country (...) her return to Afghanistan entailed a violation by Sweden and especially of Article 3 ECHR (...) the possible consequences of the woman's return to Afghanistan, taking into account both the general situation in the country and her personal situation (...) observed that women in Afghanistan risk being victims of violence if perceived as non-compliant to the gender roles that society, traditions and the entire legal system have provided for women (...) an agreeable conclusion that “is out of place”, however with the one just mentioned (...) it seems to distinguish between a general situation and particular specific individual

³⁶ECtHR, *N. v. Sweden* of 20 July 2010.

circumstances (...) the situation from a gender perspective, that would emerge is that in Afghanistan that there exists a pattern of discrimination that is not only tolerated but is also encouraged and even adopted by the authorities³⁷, to which is added a particularly sensitive individual situation, given the the woman's stay in Sweden and her departure from “classical” gender expectations (...) trying to emphasize the “particular” circumstances of the specific case, first emphasized that the situation of violation of human rights in Afghanistan per se itself could not constitute a violation of Article 3 ECHR, to then highlight that women risk violence due to their non-conformity to certain gender roles (...) women's rights are fundamental human rights, as has been well established since the Conference of Vienna of 1993. These arguments clash and emphasize a lack of gender sensitivity which, as has been noted, is often typical of the ECtHR (...)” (Sjöholm, 2018).

As regards credibility, the classical standards invoked in the cases cited in relation to female genital mutilation have granted the benefit of the doubt to those seeking asylum

³⁷See par. 37. According to the Women’s Protection and Development Commissioner of the Independent Commission on Human Rights in Afghanistan, the authorities consider violence against women as legitimate, so they do not investigate.

and noting that: “(...) the individual must provide a satisfactory explanation for the alleged discrepancies (...)”³⁸.

In particular, the ECtHR stated that:

“(...) the circumstance that the woman had asked for a divorce placed her in the category of women “unaccompanied or who lack a male tutor”, who continue to suffer discrimination in the country of origin, where they may be subject to domestic violence perpetrated not only by the ex-partner but also by the family of origin, as well as to public blame from society (Nixon, 2011). (...) There were no elements to contest the statement of woman, according to which she had not had contact with her family of origin for over five years, given the particular circumstances of the case (...) concluded that there were substantial elements to believe that, if deported to Afghanistan, the applicant would have suffered a series cumulative retaliation by the family, the husband, the husband's family, the entire society, which had to be considered in violation of Article 3 ECHR (...). This does not rest in the outcome of the appeal, which was positive for the appellant, but in the Court's extremely deferential attitude towards national practice with regard to the recognition of international protection

³⁸ECtHR, *N. v. Sweden*, op. cit., par. 53.

and the excessive evidential burden placed on the woman (...). This reiterated the exceptional nature of the situation and not the fact that the discrimination schemes pose in any case, women who do not conform to certain gender roles are at risk - even if still married, even if they are unable to demonstrate that they have no longer had contact with their family of origin - of forms of violence which constitute violations of fundamental human rights (...)” (Nixon, 2011).

FROM VICTIM’S TO A STATE’S BURDEN

The ECtHR has set limits as we understood from the previous paragraph by offering a paradigm shift that is oriented towards the victim which shifts the evidentiary burden of the victim to the state which decides on the expulsion. The elements we have are one of a state nature oriented towards ascertaining compliance with the obligations of due diligence by the state of origin, i.e. a perspective of destination of the rejection and one of an individual nature which takes into consideration the

situation of the appellant in its own complexity. The evidentiary weight of the risk situation derives from gender violence which highlights the marked protection of the Istanbul Convention where the female victim requests international protection and the state rejects the demonstration and compliance with the obligations of due diligence in the prevention and repression of gender violence, gender against women and the protection of victims by the state of origin. The protection provided by par ricochet is particularly sensitive to gender, taking into account the standards that mature at an international level where the innovations proposed by the Istanbul Convention propose that women be relocated within the state in order to avoid incurring the risk of female genital mutilation and denying international protection in strength of the opportunity to find a disproportionate burden on the woman victim of gender violence. Resettlement examines each applicant's personal situation and economic possibilities are rarely through a scrutiny of the actions of the state that condones prosecutes and fails to prevent

violence in light of the standard of due diligence. Within this context, the Istanbul Convention constitutes an interpretative tool for the application of the standard of due diligence in the adequacy of the protection that is guaranteed by the state of origin to the woman fleeing from forms of gender violence that are covered by the same legal instrument.

The woman who finds herself in these situations needs to demonstrate alternatives to the need for the state to reject and ascertain the situation of the state of origin and the ability to protect women victims of violence. For some, this is interference in the internal affairs of states, especially those that are not part of the Istanbul Convention, thus assessing the responsibility of the destination state by rejecting women victims of violence with the obligations deriving from the ECHR in light of the Istanbul Convention. Thus, the individual element of persecution relating to the patterns of discrimination that persist in these contemporary societies is also brought to the table where the examination test is the situation of the country towards which the rejection affirmed that:

“(...) in implementation of the duty of investigative cooperation required by law, must verify all the relevant facts concerning the country of origin of the applicant at the time of adoption of the decision, including the existence of regulatory provisions or practices tolerated, or in any case not adequately opposed, in the scope of the social and cultural context existing in the aforementioned country of origin, in order to ascertain whether, indeed, women are in fact discriminated against the free enjoyment and exercise of their fundamental rights (...)”³⁹.

This is an individual orientation in a specific situation where an applicant for international protection considers the reasons for grasping the multiple risks of persecution on the basis of gender (Sosa, Mestre i Mestre, 2012). It is a connection between belonging to a particular social group and the political position of a woman who opposes the patterns of oppression that are present in the country of origin, thus helping to grasp the specificity of the individual situation.

³⁹ECtHR, *N. v. Sweden*, op. cit., par. 54.

CONCLUDING REMARKS

Istanbul Convention was an important step for women and girls in the area of sexual violence, forced displacement of populations that fall within the scope of the convention obliging states to criminalize war and emergency status even in peacetime. The gender dimension in migration is also connected with climate change which is consolidated where the prospective response manages to capture the case of devastation, disasters and a deterioration of the environment as a type of slow violence (Nixon, 2011). Climate change for women is connected with the deterioration of natural resources which they are main users. The disproportionate effect of climate change on women and girls is a gendered and apparently neutral phenomenon⁴⁰. The biological difference of women compared to men outside of social, economic and political barriers is linked to the water supply which is more affected by climate change and which can migrate to another country. Phenomena where women's migration is subordinated in societies that become main direct and

⁴⁰Special Rapporteur on violence against women and girls, violence, op. cit., par. 23.

indirect victims in natural disasters.

Protection par ricochet sensitive to gender is useful for a reflection on the response to this type of migration (Villiger, 2023). The recognition of the status of a refugee who flees from a territory that is causing climate change or other forms of disasters and deterioration of the environment is subject to violence by proving that it can be demonstrated that the country of origin or destination rejects the obligations of due diligence to prevent and repress violence against women that arises from climate change or from forms of slow-onset emergencies where the victim is persecuted in a complex situation that takes into consideration elements of discrimination. This type of change and discrimination is an approach towards legal instruments that exist in a gender key. A key that recognizes the differences as well as disproportionately the phenomena affecting women and girls that respects the victims and the traumas suffered. The story is endless and the situation will continue for many years given that the issue is not so much of a legal nature which certainly lacks many elements of help in this sector but also of the attitude and training of ad hoc people to protect this type of

violence against women.

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